



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

Surface Transportation Project Delivery Program; Florida DOT Audit #2 Report

[FHWA Docket No. FHWA-2019-0012]

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Surface Transportation Project Delivery Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years to ensure the State's compliance with program requirements. This notice makes available the final report of the Florida Department of Transportation's (FDOT) second audit under the program.

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SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's responsibilities for environmental review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. Effective December 14, 2016, FDOT assumed FHWA's responsibilities for environmental review and the responsibilities for reviews under other Federal environmental requirements.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the memorandum of understanding during each of the first 4 years of State participation and, after the fourth year, monitor compliance. The results of each audit must be made available for public comment. This notice finalizes the findings of the second audit report on FDOT participation in the program. A draft version of this report was published in the Federal Register on August 22, 2019, at 84 FR 43863, and was available for public review and comments. The FHWA received one response to the Federal Register Notice during the public comment period for this draft report, which voiced the American Road and Transportation Builders Association's support for this program.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59;
Public Law 114-94; 23 U.S.C. 327; 49 CFR 1.85; 23 CFR 773.

Issued on: November 21, 2019.

Nicole R. Nason
Administrator
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FINAL

Surface Transportation Project Delivery Program FHWA Audit #2 of the Florida Department of Transportation May 2017 to April 2018

Executive Summary

This is the second audit of the Florida Department of Transportation's (FDOT) assumption of National Environmental Policy Act (NEPA) responsibilities under the Surface Transportation Project Delivery Program. Under the authority of 23 U.S.C. 327, FDOT and the Federal Highway Administration (FHWA) executed a memorandum of understanding (MOU) on December 14, 2016, whereby FHWA assigned, and FDOT assumed, FHWA's NEPA responsibilities and liabilities for Federal-aid highway projects and other related environmental reviews for transportation projects in Florida.

The FHWA formed a team in January 2018 to conduct an audit of FDOT's performance according to the terms of the MOU. The team held internal meetings to prepare for an on-site visit to the Florida Division and FDOT offices. Prior to the on-site visit, the team reviewed FDOT's NEPA project files, FDOT's response to FHWA's pre-audit information request (PAIR), and FDOT's NEPA Assignment Self-Assessment Summary Report. The team conducted interviews with FDOT and resource Agency staff and prepared preliminary audit results from September 24 - 28, 2018. The team presented these preliminary observations to FDOT Office of Environmental Management (OEM) leadership on September 28, 2018.

The FDOT continues to develop, revise, and implement procedures and processes required to carry out the NEPA Assignment Program. Overall, the team found that FDOT is committed to delivering a successful NEPA Program. This report describes numerous successful practices, two observations, and one non-compliance observation. The FDOT has carried out the responsibilities it has assumed in keeping with the intent of the MOU and FDOT's application. Through this report, FHWA is notifying FDOT of the one non-compliance observation that requires FDOT to take corrective action. By addressing the observations in this report, FDOT will continue to assure a successful program. The report concludes with the status of FHWA's non-compliance observation from the first audit review (Audit #1), including any FDOT self-imposed corrective actions.

Background

The purpose of the audits performed under the authority of 23 U.S.C. 327 is to assess a State's compliance with the provisions of the MOU as well as all applicable Federal statutes, regulations, policies, and guidance. The FHWA's review and oversight obligation entails the need to collect information to evaluate the success of the NEPA Assignment Program; to evaluate a State's progress toward achieving its performance measures as specified in the MOU; and to collect information for the administration of

the NEPA Assignment Program. This report summarizes the results of the second audit in Florida. Following this audit, FHWA will conduct two annual audits. This second audit report includes a summary discussion that describes progress since the last audit.

Scope and Methodology

The overall scope of this audit review is defined both in statute (23 U.S.C. 327) and the MOU (Part 11). An audit generally is defined as an official and careful examination and verification of accounts and records, especially of financial accounts, by an independent unbiased body. With regard to accounts or financial records, audits may follow a prescribed process or methodology and be conducted by “auditors” who have special training in those processes or methods. The FHWA considers this review to meet the definition of an audit because it is an unbiased, independent, official, and careful examination and verification of records and information about FDOT’s assumption of environmental responsibilities.

The team consisted of NEPA subject matter experts from FHWA offices in Arizona, Nebraska, Ohio, Texas, Georgia, and the District of Columbia, as well as staff from FHWA’s Florida Division. The diverse composition of the team, as well as the process of developing the review report and publishing it in the *Federal Register*, are intended to make this audit an unbiased official action taken by FHWA.

The team conducted a careful examination of FDOT policies, guidance, and manuals pertaining to NEPA responsibilities, as well as a representative sample of FDOT’s project files. Other documents, such as the August 2018 PAIR responses, and FDOT’s August 2018 Self-Assessment Summary Report, informed this review. The team interviewed FDOT staff and resource agency staff. This review is organized around six NEPA Assignment Program elements: program management; documentation and records management; quality assurance/quality control (QA/QC); legal sufficiency; performance measurement; and training program. In addition, the team considered two cross-cutting focus areas: (1) consistency between the NEPA documents and planning documents; and (2) Section 4(f) implementation and documentation.

The team defined the timeframe for highway project environmental approvals subject to this second audit to be between May 2017 and April 2018, when 898 projects were approved. The team drew both representative and judgmental samples totaling 105 projects from data in FDOT’s online file system, Statewide Environmental Project Tracker (SWEPT). In the context of this report, descriptions of Type 1 Categorical Exclusions (CE) and Type 2 CEs are consistent with FDOT’s Project Development and Environment Manual. The FHWA judgmentally selected all Type 2 CEs (11 projects), all Environmental Assessments (EA) with Findings of No Significant Impacts (1 project), and all Environmental Impact Statements (EIS) with Records of Decision (no projects fell into this category). The FHWA determined the sample size applying a 90 percent confidence level, a 10 percent margin of error to the Type 1 CEs, and then separately to the reevaluations. For the Type 1 CEs (64 projects), FHWA applied a judgmental

distribution of the sample based on the percentage of each type of Type 1 CE in the sample universe. For the re-evaluations (29 projects), FHWA applied a judgmental distribution of the sample based on the percentage of each class of action in the sample universe. The FHWA also ensured each district office was reasonably represented for both Type 1 CEs and re-evaluations. The team reviewed projects in all of FDOT's seven districts.

The team submitted a PAIR to FDOT that contained 35 questions covering all 6 NEPA Assignment Program elements. The FDOT responses to the PAIR were used to develop specific follow-up questions for the on-site interviews with FDOT staff.

The team conducted a total of 31 interviews. Interview participants included staff from three of FDOT's seven district offices that were not interviewed in the first audit, District 3 (Chipley), District 4 (Ft. Lauderdale), and District 6 (Miami), and FDOT Central Office. The team interviewed FDOT environmental staff, middle management and executive management, regional representatives from the National Oceanic and Atmospheric Administration (NOAA) - National Marine Fisheries Service (NMFS), the U.S. Coast Guard (USCG), the U.S. Fish and Wildlife Service (USFWS), and the State Historic Preservation Officer (SHPO) from the Florida Department of State, Division of Historic Resources.

The team compared FDOT policies and procedures (including the published 2017 Project Development & Environment (PD&E) Manual) to the information obtained during interviews and project file reviews to determine if FDOT's performance of its MOU responsibilities are in accordance with FDOT policies and procedures and Federal requirements. Individual observations were documented during interviews and reviews and combined under the six NEPA Assignment Program elements. The audit results are described below by program element.

Overall Audit Opinion

The team recognizes that FDOT's efforts have been focused on implementing the requirements of the MOU by: processing and approving projects; refining policies, procedures, and guidance documents; refining the SWEPT tracking system for "official project files"; training staff; implementing a QA/QC Plan; and conducting a self-assessment for monitoring compliance with the assumed responsibilities. The team found evidence of FDOT's continuing efforts to train staff in clarifying the roles and responsibilities of FDOT staff, and in educating staff in an effort to assure compliance with all of the assigned responsibilities.

During the second audit, the team identified numerous successful practices, two observations, and one non-compliance observation that FDOT will need to address through corrective actions. These results came from a review of FDOT procedures, project file documentation, and interviews with FDOT and resource agencies.

The FDOT has carried out the responsibilities it has assumed consistent with the intent of the MOU and FDOT's application. By addressing the observations in this report, FDOT will continue to assure a successful program.

Successful Practices and Observations

Successful practices are practices that the team believes are positive, and encourages FDOT to consider continuing or expanding those programs in the future. The team identified numerous successful practices in this report. Observations are items the team would like to draw FDOT's attention to, which may improve processes, procedures, and/or outcomes. The team identified two observations in this report.

A non-compliance observation is an instance where the team finds the State is not in compliance or is deficient with regard to a Federal regulation, statute, guidance, policy, State procedure, or the MOU. Non-compliance may also include instances where the State has failed to secure or maintain adequate personnel and/or financial resources to carry out the responsibilities they have assumed. The FHWA expects the State to develop and implement corrective actions to address all non-compliance observations. The team identified one non-compliance observation during this second audit.

The team acknowledges that sharing initial results during the site visit closeout and sharing the draft audit report with FDOT provides them the opportunity to begin implementing corrective actions to improve the program. The FHWA will also consider actions taken by FDOT to address these observations as part of the scope of Audit #3.

The Audit Report addresses all six MOU program elements as separate discussions.

Program Management

Successful Practices

The team learned that FDOT has maintained its good working relationship with the two new resource agency staff interviewed – USCG and NOAA-NMFS. They stated that FDOT coordinated any changes in their program with the Agency to ensure satisfaction with their regulatory requirements and were very pleased with the coordination by FDOT at the district and OEM level. The USCG stated that the Florida Efficient Transportation Decision Making System facilitates their early involvement and coordination. The FHWA applauds this practice.

During interviews, FHWA learned of good internal communication between OEM and the districts regarding SWEPT assistance. This includes the assistance provided by OEM with the SWEPT hotline and one district uses a successful single SWEPT point of contact for internal consistency purposes. In addition, OEM continues to promote training on environmental and NEPA Assignment topics, and annual PD&E Manual updates on all topics, as needed.

The FDOT/OEM uses a spreadsheet for internal purposes to track policy updates and procedures received from FHWA and the actions they took to address. This practice reflects transparency and awareness by FDOT on changes to keep current with FHWA requirements under the MOU.

The team learned through interviews, in some instances, that the District Director and/or Environmental Manager review NEPA documents as an additional level of QA/QC on projects of interest. This practice shows local ownership and pride in districts wanting to do the best job they can do under NEPA Assignment, beyond what OEM may require.

Observation #1: FDOT's identification and documentation of commitments may result in mitigation required by Federal regulation.

There are several program elements that lead to this observation. The provisions on "Commitment" in the FDOT PD&E Manual (e.g., Section 22.1.1) do not fully implement FHWA requirements to include in the environmental document all mitigation measures stated as commitments (23 CFR 771.105(a) and 771.109(b)). The identification of project impacts and the documentation of commitments must demonstrate that FDOT has reasonably considered the significance of a project's impacts within a NEPA approval appropriate to the project's class of action.

The team also found some of the NEPA documents reviewed make a general commitment regarding intent to obtain a permit, but do not address the project impacts associated with the permit or the commitments to avoid, mitigate, or minimize the impacts. Citing the need for a permit does not fully meet the requirement to document commitments to address project impacts at the time of a NEPA approval. In addition, some FDOT project files referenced standard specifications in lieu of identifying project specific commitments to address project impacts in the NEPA document, which does not align with FHWA policy. The FHWA Audit interviews and project file review confirm these findings (8 projects).

Observation #2: Endangered Species Act (ESA) finding was unsupported on certain projects.

The team identified 18 project files with a "no effect" ESA finding based solely on a description of the project's scope. The FHWA policy and guidance (February 2002 FHWA Management of the Endangered Species Act (ESA) Environmental Analysis and Consultation Process guidance memorandum (https://www.environment.fhwa.dot.gov/legislation/other_legislation/natural/laws_esaguide.aspx)) states that the ESA evaluation of impacts is dependent on the scope of the project, as well as ecological importance and distribution of the affected species, and intensity of potential impacts of the project.

The team identified four project files with a "no effect" ESA finding which referenced a Programmatic Biological Opinion between USFWS and other entities, to which FDOT is

not a signatory, including some that provide species-specific consultation “keys” to support a “no effect” finding. The team learned from an interview with USFWS staff that FDOT should not specifically reference such “keys” as part of its informal and/or formal Section 7 ESA processes unless and until FDOT becomes a party to those programmatic agreements. Also, the team found that FDOT used “keys” as support for project impact decisions for species which do not have “keys.” Finally, FDOT’s PD&E Manual does not include a procedure providing for use of the “keys” and does not address how the “keys” should be applied when making ESA findings.

Since receiving the draft audit report, FDOT reported to FHWA that it has coordinated with USFWS in order to address this observation, developed training and updated its guidance addressing this observation.

Quality Assurance/Quality Control

Successful Practices

From the PAIR and during the interviews, FDOT staff provided evidence of many new QA/QC tools using directions, forms, and procedures that will improve documentation and record keeping and may address many of the projects contained within the non-compliance observation of the 2017 Audit and FDOT’s 2017 Self-Assessment. These new tools are likely to reduce the risk of future non-compliant projects through enhanced QA/QC. Examples of these QA/QC improved tools include a Consultant QC Plan, a Natural Resource Evaluation template, and a Section 106 Memorandum of Agreement for Adverse Impacts.

The FDOT has continued to update its PD&E Manual to ensure that it encompasses all new applicable laws, regulations, and guidance. The FDOT has a dedicated person responsible for coordinating an annual PD&E Manual update. The FDOT has an intense vetting process for the PD&E Manual update. The draft changes are shared with subject matter experts and then undergo peer, district, and management reviews. Resource agencies may also review changes as needed. The update will include new direction to document preparers that specifies when additional project documentation is needed. Many of these additions stem from the 2017 Audit findings and FDOT’s 2017 Self-Assessment. The PD&E Manual update process is likely to eliminate many of the documentation issues found by FHWA in the 2017 and 2018 audits.

Legal Sufficiency

The team’s review of FDOT’s legal sufficiency program found that FDOT has structured the legal sufficiency process for the NEPA Assignment Program by having in-house counsel, as well as outside counsel with NEPA experience, available. The team appreciates that FDOT has chosen to house its Special Counsel for Environmental Affairs and two staff attorneys under the direct supervision of the FDOT Deputy General Counsel.

While no legal sufficiency determinations have been made by FDOT during the audit time frame, FDOT's Office of General Counsel (OGC) participates in monthly coordination meetings and topic-specific meetings with OEM and the districts. The OGC also reviews other documents when requested for legal input. There is close collaboration throughout the process amongst and between OGC, OEM, and the district attorneys.

Training Program

Through interviews with the OEM leadership the team learned that rather than preparing an annual training plan, OEM has a training program that is constantly being assessed, revised, and updated as an on-line program. The program includes training on a wide variety of subjects, and training is delivered both face-to-face and virtually. The FDOT staff said that training is a common topic of discussion of leadership as well as staff, including frequently asking about needed training.

Successful Practices

The team learned through interviews FDOT closely tracks training rosters and registrations that evidence a broad number of training events to a high number of people. Over the past 12-14 months, FDOT trained over 2,000 people through 36 courses.

The team learned that OEM is always looking at the training program to find ways to augment it. For example, FDOT is now working with the SHPO staff to develop topic-specific Webinars on how information for the SHPO is to be organized and projects documented. The FDOT also has worked with NOAA-NMFS on their concerns in developing training. These trainings, along with a new short Web-based training module on producing environmental documents, are waiting to be uploaded to the OEM Website.

The OEM leadership indicated in an interview that they have a number of staff that are new to FDOT, and, in general, have less than 5 years of experience. These new staff members were mentored by seasoned staff to serve as a resource to help understand FDOT's procedures and the key issues in NEPA. By monitoring the performance measures on compliance, OEM leadership indicated the mentoring is a successful practice.

Performance Measures

The FDOT Self-Assessment Summary Report contained the results of FDOT's second report of its assessment of the NEPA Assignment Program and FDOT procedures compliance. This assessment, for the period between May 1, 2017, and April 30, 2018, entailed review of project files as well as results from a survey of Agency satisfaction. The report also included a discussion of FDOT's progress in meeting the performance

measures. During the report period, there were no qualifying projects for Legal Sufficiency, NEPA Issue Resolution, and NEPA Approval Time Savings measures.

Successful Practices

The FDOT has 14 performance metrics to monitor and assess accomplishment of the 4 performance measures in the MOU, Section 10.2.1. The FDOT is actively monitoring these performance measures. Data for the performance metrics are generated and reported quarterly and annually in SWEPT. If FDOT identifies indicators that could affect its performance measures, it can promptly take actions to address the issues.

The OEM leadership stated in interviews that the FDOT timeliness measure is used both as a way to streamline the review process and to understand it better. For example, OEM leadership told the team that FDOT has changed some of the time reporting measures for environmental review staff. Project review duration includes a need for every project to go through the electronic review comments (ERC) process first and then a formal review and approval period in SWEPT. When in SWEPT, there is a review process with a number of days assigned. The FDOT realized for certain projects, ones that have minor impacts, no ERC review was necessary which further streamlined the project review process. The OEM leadership also stated in an interview that the 30-day review period is being constantly monitored in order to ensure if a modification to procedure is needed, it can be made. The OEM leadership also stated that during the first two rating periods no modification to the review period has been needed.

Documentation and Records Management

The FDOT continues to use SWEPT as the NEPA file of record for federally funded projects. The FDOT has implemented several process improvements within SWEPT. Communication during the second audit cycle allowed staff to clarify many project level observations within the Audit process. The FDOT and FHWA have committed to continue communications to resolve issues identified within the audit process.

Non-Compliance Observation #1: Some FDOT project files contain insufficient documentation to support the environmental analysis or decision.

Both the MOU (subpart 10.2.1) and FDOT's PD&E Manual specify that documentation is needed to support compliance. The SWEPT has been identified as FDOT's project file of record, in which FDOT maintains approved reevaluations, CEs, EAs, and EISs. The team reviewed 105 projects for the 2018 Audit #2 that constituted a statistically valid sample. As part of the initial project file review, the team observed that 54 of the 105 project files reviewed lacked documentation in SWEPT to support the environmental analysis or the basis for an FDOT decision. In some cases, there were multiple observations for one project.

For example, one project file did not contain documentation of coordination with FHWA or USCG for the required (23 CFR 650.805 and 23 CFR 650.807) navigability assessment in order to support a permit determination. Additional examples, where the team observed documentation deficiencies included commitments, planning consistency, and mitigation. The team also observed that some commitments to address project impacts through mitigation, avoidance, and minimization were not documented at the time of NEPA approval. When the environmental document lacks commitments for important project impacts, the project record does not reflect a complete consideration of the significance of a project's impacts. Another consequence is that some commitments are added after the NEPA decision, are not tracked, or get dropped, which is not in accordance with Federal regulations. (23 CFR 771.105(a), 23 CFR 771.105(d), and 23 CFR 771.109(d)). Finally, project files were observed that did not include the Project Commitment Record for documenting commitments as required by the 2017 PD&E Manual.

The team's comments on these projects were shared with FDOT for its consideration and the team received responses from FDOT. The FHWA and FDOT have productively worked together to successfully resolve insufficient documentation for 23 projects and uploaded existing documentation in SWEPT for 18 projects. The FDOT indicated that it has implemented or committed to implementing process improvements to address the deficiencies. The FDOT is expected to continue implementation of corrective actions that would address these issues.

Update from 2017 Audit #1 Non-Compliance Observation #1: Some FDOT project files contain insufficient documentation to support the environmental analysis or decision.

The FHWA reported a non-compliance observation related to some FDOT project files that lacked documentation to support the environmental analysis or decision as part of Audit #1. This non-compliance observation is based on a review that resulted in observations on 47 projects, several of which had deficient documentation for more than one issue. The FDOT and FHWA have met over the past year and have productively worked together to resolve documentation issues from the previous audit. The FHWA shared comments on these projects with FDOT and they provided written responses. Based on these responses, FHWA and FDOT were able to successfully address many documentation issues through resolving a project observation (22 projects), FDOT uploading missing documentation in SWEPT (5 projects), or FDOT implementing or committed to implementing process improvements to address procedural deficiencies (39 projects). For example, FDOT updated its electronic Type 1 CE form in SWEPT to require certain supporting documentation be uploaded, which was confirmed through the Audit #2 FDOT staff interviews and project file reviews. The FDOT also included a direct link to the State Transportation Improvement Plan or Transportation Improvement Plan to ensure adequate documentation of planning consistency for all classes of action. The FDOT has made considerable strides to document planning consistency at NEPA approval. However, documentation of consistency with the metropolitan long-range transportation plans was missing for several projects and for a variety of classes of action.

In addition, the 2018 FDOT Self-Assessment Summary states that FDOT initiated and completed a number of SWEPT system and programmatic enhancements to address the missing documentation noted during Audit #1. The FDOT is expected to continue implementation of corrective actions that would address these issues.

Finalizing this Report

The FHWA received one response to the Federal Register Notice during the public comment period for this draft report, which voiced the American Road and Transportation Builders Association's support for this program and did not relate specifically to Audit #2. This report is a finalized version of the draft report without substantive changes.

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